September 2021

Decision in CPLR Article 78 proceedings - Hernandez, Edison (2009-01-23)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of EDISON HERNANDEZ,

Petitioner,

-against-

GEORGE B. ALEXANDER,
Chairman of the State of New York,
Executive Department,
Division of Parole,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST9554 Index No. 8583-08

Appearances: Edison Hernandez
Inmate No. 07-A-1934
Petitioner, Pro Se
Greene Correctional Facility
Post Office Box 8
Coxsackie, NY 12051-0008

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Greene Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated October 9, 2007 to deny him discretionary release on parole. Petitioner is serving a term of one and one half to four and one half years upon his conviction of the crime of reckless endangerment first degree in connection with the setting of a fire in an apartment building. He has no memory of the incident. Among the many arguments set forth in the petition, the petitioner criticizes the Parole Board for devoting too much of the parole interview to a discussion of the crime for which he was incarcerated. He maintains that during the parole interview the Parole Board engaged in "unwarranted speculation" with regard to the evidence of his guilt. He maintains that the Parole Board did not consider petitioner's supporting documents or other information in his institutional record. The petitioner contends that other than the instant conviction, he has had a clean record and has been gainfully employed for some thirty years. He faults the Parole Board for not considering the fact that a heart attack which he suffered while incarcerated has prevented him from obtaining necessary programing.

The petitioner argues that Commissioner Jennifer Arena does not have the educational qualifications and experience to serve on the Parole Board. He indicates that the Parole Board improperly relied upon the seriousness of the crime for which he was convicted as its sole reason for denying release. He indicates that the sentencing judge intended that the petitioner be released upon completion of his minimum term; and that the Parole Board has, in effect, re-sentenced him to a new term of imprisonment. He advances the argument that in order to be denied release there must exist what he terms "some significantly aggravating

or egregious circumstances" with respect to the crime for which he was convicted. He strongly disagrees with the Parole Board's characterization of his crime as "seriously depraved behavior".

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "After a review of the record and interview parole is denied. You are currently serving 1-6 4-6 years upon your conviction for reckless endangerment 1st whereby you set fire to a pile of garbage inside the lobby of an occupied 40 unit apartment building. At the time you did this you were having trouble with the landlord of the complex. You have yet to benefit from therapeutic programming to address your seriously depraved behavior. Therefore, the panel concludes that discretionary release is not appropriate at this time as you pose a risk to the communities safety."

As stated in Executive Law §259-i (2) (c) (A):

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the

> federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the Parole Board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's lack of institutional programming, his medical problems, and his plans upon release, including his intention to live with his daughter. He was given an opportunity to speak on his own behalf, and indicated, *inter alia*, that he is a Christian man. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and

it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i

[2] [c] [A], other citations omitted).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing are conclusory and without merit (see Matter of Crews v New York State Exec. Dept. Bd. of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A [Sup. Ct., Westchester County, 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the sentencing court (see Matter of Silmon v Travis, 95 NY2d 470, 476, supra; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006], lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

Petitioner's assertions concerning Commissioner Arena's qualifications are unsupported in the record, but in any event would not operate to undermine her lawful authority as a duly appointed Parole Commissioner under Executive Law § 259-b.

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The

petition must therefore be dismissed.

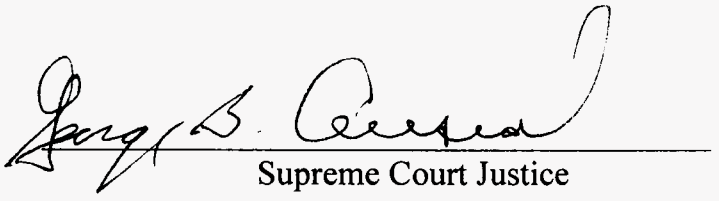
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: January 23, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated October 28, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 23, 2008, Supporting Papers and Exhibits

Not Considered:

1. Petitioner's Letter dated December 10, 2008, with enclosures, for which there is no evidence that a copy thereof was served upon the attorney for the respondent.